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Attorneys for Zacky Farms, LLC

UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF CALIFORNIA
 SACRAMENTO DIVISION

In re:

ZACKY FARMS, LLC, a
 California limited liability
 company,

Debtor-In-Possession.

CASE NO. 12-37961-B-11

DCN: FWP-23

Date: January 22, 2013
 Time: 9:32 a.m.
 Courtroom: 32
 501 I Street, 6th Floor
 Sacramento, CA

**EXHIBITS TO MOTION TO APPROVE STIPULATED DISMISSAL OF FOSTER
 POULTRY FARMS ADVERSARY PROCEEDING**

EXHIBIT	DESCRIPTION
A	Stipulation
B	Debtor's Reply to Opposition/Objection of Foster Poultry Farms D/B/A Foster Farms to Debtor's Motion for Authority to Assume and Assign Certain Unexpired Other Executory Contracts and Leases In Connection with the Proposed Sale of Substantially All of the Debtor's Assets

Dated: January 2, 2013

FELDERSTEIN FITZGERALD
 WILLOUGHBY & PASCUZZI LLP

By: /s/ Thomas A. Willoughby
 THOMAS A. WILLOUGHBY
 Attorneys for Zacky Farms, LLC

EXHIBIT A

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

ZACKY FARMS, LLC,
Debtor.

Case No. 12-37961-TH
Chapter 11
Adv. Pro. No.: 12-02672
DCN: SS-4

**STIPULATION AND ORDER
DISMISSING THE FIRST AMENDED
COMPLAINT WITHOUT PREJUDICE**

FOSTER POULTRY FARMS,
Plaintiff,
v.
ZACKY FARMS, LLC,
Defendant.

**Date: January 8, 2013
Time: 9:32 a.m.
Judge: Thomas C. Holman
Dept. B
501 I Street, 6th Floor,
Courtroom 32
Sacramento, CA**

1 Plaintiff Foster Poultry Farms (“Foster Farms”) and Defendant Zacky Farms, LLC
2 (“Zacky Farms”) (collectively, “the Parties”), through their respective attorneys of record herein,
3 stipulate and agree to resolve the above-captioned litigation on the terms set forth below and
4 respectfully request that the Court enter an Order upon the following stipulation (“Stipulation”):

5 1. Without admitting any obligation to cease, and without waving any rights and/or
6 defenses it has with respect to the assertions in the present adversary action, Zacky Farms agrees
7 and immediately will cease and desist using, or encouraging, inducing, enabling or otherwise
8 assisting any person or entity in the use of, the “Zacky Farms” trademark in the conjunction with
9 the production, sale or distribution of chicken products other than “Ancillary Chicken Products”
10 as defined in the Purchase Agreement (Dkt. 26 at Ex. 1) for the duration of this bankruptcy
11 proceeding (collectively, “Prohibited Conduct”).

12 2. This Stipulation and Order is without prejudice to any rights that Foster Farms
13 may have to recover damages for the activities specified in its First Amended Complaint (Dkt.
14 26), and is without prejudice to any and all defenses, set offs and/or counterclaims Zacky Farms
15 that Zacky Farms may possess with respect to such asserted damages.

16 3. The Court shall retain jurisdiction to enforce this Stipulation and Order.

17 4. If Zacky Farms, after execution and entry of this Stipulation and Order, engages
18 in Prohibited Conduct, Foster Farms shall move to enforce this Stipulation and Order and shall
19 be entitled to recover from Zacky Farms its costs and reasonable attorneys’ fees incurred in
20 enforcing this Stipulation and Order pursuant to California Civil Code section 1717 or otherwise
21 enjoining Zacky from engaging in Prohibited Conduct.

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5. The First Amended Complaint is dismissed without prejudice.

Dated: December 14, 2012

STIPULATED TO AND AGREED UPON:

/s/ Thomas A. Willoughby

/s/ Carmine R. Zarlenga

Thomas A. Willoughby (SBN 137597)
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Carmine R. Zarlenga
MAYER BROWN LLP
Attorneys for Plaintiff
FOSTER POULTRY FARMS

SO ORDERED.

DATED: _____, 2013

Hon. Thomas Holman
United States Bankruptcy Judge

EXHIBIT B

1 DONALD W. FITZGERALD, State Bar No. 095348
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13 Attorneys for Zacky Farms, LLC

14 UNITED STATES BANKRUPTCY COURT
 15 EASTERN DISTRICT OF CALIFORNIA
 16 SACRAMENTO DIVISION

17 In re:

18 ZACKY FARMS, LLC, a California
 19 limited liability company,

20 Debtor-In-Possession.

CASE NO. 12-37961

DCN: FWP-19

Date: January 8, 2013
 Time: 9:32 a.m.
 Courtroom: 32
 501 I Street, 6th Floor
 Sacramento, CA

21 **REPLY TO OPPOSITION/OBJECTION OF FOSTER POULTRY FARMS D/B/A**
 22 **FOSTER FARMS TO DEBTOR'S MOTION FOR AUTHORITY TO ASSUME AND**
 23 **ASSIGN CERTAIN UNEXPIRED OTHER EXECUTORY CONTRACTS AND**
 24 **LEASES IN CONNECTION WITH THE PROPOSED SALE OF SUBSTANTIALLY**
 25 **ALL OF THE DEBTOR'S ASSETS**

26 Zacky Farms, LLC, a California limited liability company (the "Debtor"), debtor and
 27 debtor in possession, hereby replies to the opposition ("Opposition") filed by Foster Poultry
 28 Farms d/b/a/ Foster Farms ("Foster Farms") to Debtor's Motion for Authority to Assume and
 Assign Certain Unexpired Other Executory Contracts and Leases in Connection with the
 Proposed Sale of Substantially all of the Debtor's Assets ("Motion").¹

In the Opposition, Foster Farms admits that it unilaterally terminated the Shared Services
 Agreement ("SSA") in July 2012. Using its unilateral termination, Foster Farms now asserts that
 the SSA is not an executory contract and cannot be assumed by the Debtor. However, the

¹ All defined terms not defined herein have the meanings ascribed in the Motion.

1 unilateral breach by Foster Farms did not terminate the SSA under California law. As the
2 California Supreme Court has stated:

3 It is well settled in this state that one who has been injured by a breach of
4 contract has an election to pursue any of three remedies, to wit: He may treat the
5 contract as rescinded and may recover upon a quantum meruit so far as he has
6 performed; or *he may keep the contract alive, for the benefit of both parties, being
at all times ready and able to perform*; or, third, he may treat the repudiation as
putting an end to the contract for all purposes of performance, and sue for the
profits he would have realized if he had not been prevented from performing.

7 *Alder v. Drudis*, 30 Cal. 2d 372, 381-82 (1947) (internal quotation marks omitted) (emphasis
8 added). Because the Debtor has elected to continue the SSA notwithstanding the unilateral
9 breach by Foster Farms, the SSA can be assumed by the Debtor.

10 Even though the Debtor has elected to continue the SSA, the Debtor also recognizes that
11 whether the SSA has been terminated involves disputed issues of fact that likely will require
12 extensive litigation to resolve. Supplemental Declaration of Keith F. Cooper in support of this
13 Reply ¶ 4. At this juncture, no purchaser is currently seeking to assume the SSA so any litigation
14 over the effect of Foster Farms' purported unilateral termination does not need to be resolved at
15 the January 8 hearing. *Id.* ¶ 4. However, the bid deadline is after the January 8 hearing date and
16 there could be a bidder who proposes to assume the SSA. *Id.* ¶ 4. The Debtor proposes that the
17 SSA will not be assumed and assigned at the January 18 sale hearing. *Id.* ¶ 5. Rather, if a
18 purchaser is interested in assuming the SSA, the Court may approve assumption and assignment
19 of the SSA conditioned upon a final determination that the SSA can be assumed and assigned,
20 with the purchaser pursuing such litigation at the purchaser's expense and with Foster Farms
21 retaining all rights to defend against such litigation. *See, e.g., United Airlines, Inc. v. U.S. Bank*
22 *Nat'l Assoc., Inc. (In re United Airlines)*, 447 F.3d 504 (7th Cir. 2006) (where the debtor was
23 permitted to conditionally assume a lease under a confirmed plan of reorganization pending a
24 determination that the underlying obligation was a lease).

25 By deferring the resolution of the consequences of Foster Farms' actions in July 2012, the
26 Debtor is not waiving the Debtor's damage claim against Foster Farms for Foster Farms'
27 unilateral breach of the SSA. At a minimum, Foster Farms' \$12 per ton increase in the feed sold
28 to the Debtor in violation of the SSA contributed to the Debtor's bankruptcy filing, and all the

1 damages that flow from such filing. *Id.* ¶ 6. The Debtor expressly preserves all damages the
2 Debtor has against Foster Farms for Foster Farms' unilateral breach of the SSA.

3 Dated: January 2, 2013

4 FELDERSTEIN FITZGERALD
5 WILLOUGHBY & PASCUZZI LLP

6 By: /s/ Thomas A. Willoughby
7 THOMAS A. WILLOUGHBY
8 Attorneys for Zacky Farms, LLC
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